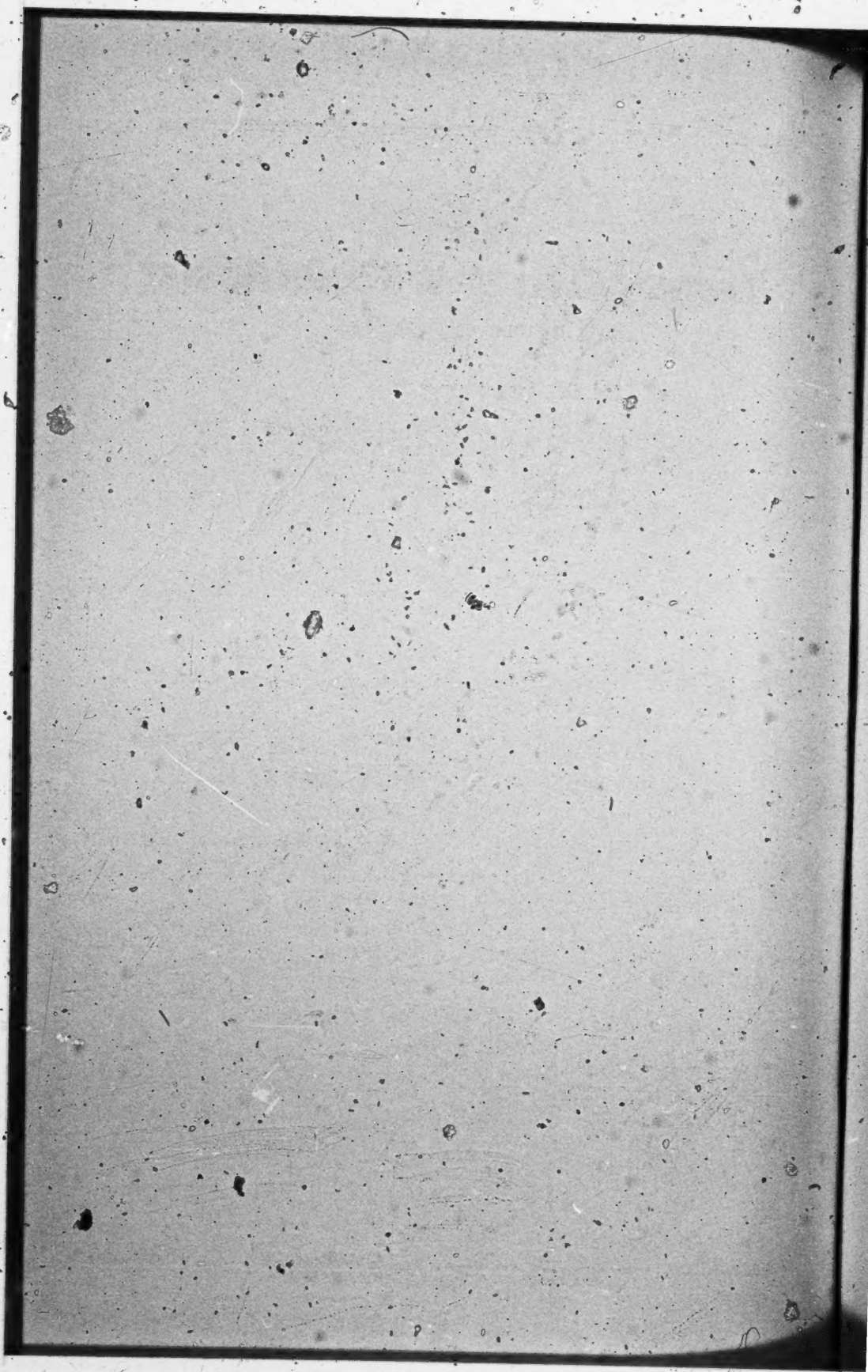

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Office Supreme Court, U. S.
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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

NUMBER 263.

MAAS & WALDSTEIN COMPANY,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

REPLY BRIEF FOR PETITIONER.

In its brief in opposition to the grant of the writ, the Government attempts to support the final result reached by the Court of Claims without accepting the reasoning by which that Court reached its result. The following admission is found on page 6 of the Government's brief:

> "The reasoning of the Court as to these points does not seem clear and we do not support it, but the result, we submit, is correct."

However, in supporting the result of the case, the Government's brief is tainted with one of the principal errors made by the Court of Claims. The Court of Claims held that the taxes refunded were not *illegally collected*, and that for that reason there could be no *protest*. This holding is expressed in the following language taken from the opinion of the Court:

> "It (plaintiff) was granted a refund not because it would have been illegally assessed had the commissioner refused to grant it, because had he refused the plaintiff would have been without remedy, as the matter was within his discretion, even if it had filed a formal protest and a formal claim for a refund. . . . A request for a special assessment, therefore, under these circumstances, does not convey the idea, the thought, or conviction that it was intended as or was a protest, or a claim for a refund, since it is clear that neither one would have been of any benefit to it as far as the decision of the commissioner was concerned. . . . The plaintiff by the assessment under its return had not been illegally assessed as to its invested capital, for the decision of the commissioner was final and legal" (R. 28, 29).

The same idea seems to be expressed in the brief for the United States in opposition to the writ of certiorari. The following is taken from page 5 of the brief for the United States:

> "The letters merely request a hearing on a matter entirely within the Commissioner's discretion, on the ground that unless special assessment is given, it would be *unfairly but legally* bound to pay taxes disproportionate to the taxes of other companies in the same line of business." (Italics ours.)

Both the opinion of the Court of Claims and the brief for the United States in this Court assume that a valid protest exists only where the tax protested against is illegal.

We do not concede that a claim for refund or a protest within the meaning of Section 1324(a) of the Revenue Act of 1921 involves any idea of illegality of the tax other than that on some ground some amount is legally refundable. Even granting, however, that the illegality of the tax refunded is an essential basis of a protest or a claim for refund within the meaning of Section 1324(a), this element is present in the case at bar.

We submit that if a taxpayer was entitled to have its tax assessed under Section 210 of the Revenue Act of 1917 the collection of a greater amount of tax, assessed under Section 201 of the Revenue Act of 1917, was illegal. The contrary position which is taken by the Court of Claims and by the Solicitor General in his brief in this Court is due to a misunderstanding of the nature of Section 210 and of the decision of this Court in the *Williamsport Wire Rope case*, 277 U S. 551. The *Williamsport Wire Rope case* held that an action could not be maintained in the Court of Claims for the refund of taxes based upon Section 210 of the Revenue Act of 1917 (or Sections 327 and 328 of the Revenue Act of 1918). The application of Section 210 was thus left to the administrative discretion of the Commissioner. But of course it was not denied that a taxpayer had a legal right to special assessment where his case fell within the provisions of Section 210. The enforcement of this legal right was simply left to an administrative tribunal rather than to a Court.

While there may be no right in a suit based upon a claim for refund to force the Commissioner to grant special

relief under Section 210, the Act is mandatory upon him to do so in the proper case. Section 210 provides:

> "That if the Secretary of the Treasury is unable in any case satisfactorily to determine the invested capital, the amount of the deduction *shall be* the sum of an amount equal to the same proportion of the net income of the trade or business received during the taxable year as the proportion which the average deduction . . . for the same calendar year of representative corporations . . . engaged in a like or similar trade or business, bears to the total net income of the trade or business received by such corporations, etc." (Italics ours.)

It should be noticed that it is not provided that the Secretary or Commissioner *may* in his discretion grant special assessment. On the contrary the law declares that when a certain condition exists the amount of the invested capital deduction *shall be* computed in the manner specified. If the facts of a taxpayer's case bring it within the terms of this section, he is entitled legally, under this statutory provision, to special assessment. If the law gives him the right to special assessment, a greater amount of taxes collected from him on another basis is illegal and excessive. All that the *Williamsport Wire Rope case* holds is that the Commissioner or Secretary of the Treasury will generally have the final decision on the question whether a taxpayer is legally entitled to special assessment under this section, and, by the same step, whether the taxes collected without resort to Section 210 are excessive and illegal.

As was said by the Board of Tax Appeals in *Appeal of Davis*, 2 B. T. A., 328, after quoting Section 327 of the Revenue Act of 1918.

"In three of the four cases above, it is necessary for the Commissioner to determine certain facts which operate as conditions precedent to the application of Section 328, *but when these conditions precedent have been found by him the application of the statute is mandatory.* . . . Under these circumstances, we are of the opinion that, where the Commissioner has once found the antecedent circumstances, the provisions of Section 327 and 328 apply, and *the tax must be computed under the latter section.*" (Italics ours.)

The Government's argument really amounts to the proposition that since the Commissioner might have denied special assessment and decided that the taxes imposed under Section 201 were legally collected, no protest was possible. But this is a possibility which is present in every protest. The court, Commissioner or other tribunal which passes upon any protest or claim for refund may in any case deny the taxpayer's claim and hold that the taxes were legally collected. If the Government's reasoning is sound, there could never in any case be a valid protest against illegality because it may be ultimately determined by the Commissioner, judge or tribunal vested with final decision in the case that the taxes were not illegally collected!

The Government's brief also seems to make the point that the letters written by the petitioner did not contain the word "protest" or its equivalent; that they contained merely a request for a hearing but no "objection" to the payment of the tax.

The petitioner in the letters which it filed with the return (R. 8) and which it wrote to the Collector at the time of paying the tax (R. 10) said in substance and effect:

> "You have assessed us under Section 201; we claim that we should be assessed under Section 210 and request such assessment."

The Government apparently contends that because the petitioner did not add the express words "We protest against assessment under Section 201", it was not protesting against such assessment nor objecting to paying the tax assessed. Surely the assertion of a right to one form or rate of assessment is a protest or objection to a different form or rate. A request for assessment under Section 210 is a protest against assessment under Section 201.

This court has held that a protest need not contain the word "protest" or "objection". In *Greenport Basin & Construction Co.* v. *U. S.*, 260 U. S. 512, a claim for abatement filed before payment of the tax was recognized as a valid protest. A claim for abatement (Treasury Department Form 843) nowhere contains the word "protest" or "objection". Nor does it contain any statement that the assessment is illegal. It is, in fact, interesting to note that the language used is substantially identical with that used by the petitioner in this case. Line 4 of Form 843 (claim for abatement) reads: "Reduction of Tax hereby *Requested*" (italics ours). This is the exact word which the petitioner used and to which the Government is now objecting.

The argument contained on page 6 of the Government's brief to the effect that the request for special assessment was not a claim for refund is directed against an alternative contention raised by the petitioner in the lower court but not pressed here. The Government admits on page 5 of its brief that a formal claim for refund was filed on December 30, 1921. This is in accord with special findings

of fact No. XI (R. 21). This leaves the question of protest as the sole question for decision.

Respectfully submitted,

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